

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-3397-99
HPBonner

date:

JUN 18 1999

to: District Director, New England District
Attn: E:PPQMB:Daronson

from: District Counsel, New England District, Boston

subject: Request for Technical Advice: Restricted Consent
Taxpayer: [REDACTED]
EIN: [REDACTED]
Taxable Year: [REDACTED]
Statute of Limitations Expires: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in response to your request for technical advice dated [REDACTED]. You are examining the taxpayer's [REDACTED], [REDACTED] and [REDACTED] taxable years. You asked what language should be used on a restricted consent to extend the period of limitations for assessment of F.I.C.A. tax for the taxable period of [REDACTED] ending [REDACTED].

Stock of the taxpayer was acquired by employees of the taxpayer pursuant to an Employee Stock Purchase Plan as defined

in I.R.C. § 423(b). Disqualifying dispositions of stock so acquired were made by employees during the taxable years [REDACTED]. The examining agent determined that gain equal to the difference between purchase price of the stock and its fair market value when acquired was wages to the employees in the year in which the disqualifying dispositions were made for both federal income withholding tax and F.I.C.A. tax purposes. The taxpayer has agreed to the assessment of federal income tax withholding on the gains realized from such disqualifying dispositions but does not agree to the assessment of Federal Insurance Contribution Act tax on such gains. The taxpayer has indicated it will only sign a restricted consent to extend the period of limitations for assessment of F.I.C.A. tax for [REDACTED].

Whether the taxpayer is liable for F.I.C.A. tax on the gains realized from disqualifying dispositions by employees of stock acquired pursuant to the taxpayer's Employee Stock Purchase Plan is in issue in this case. The taxpayer filed a formal protest that was received on [REDACTED].

IRM 4635(10) provides that the procedures in IRM 4541 for preparing and processing income tax consents are generally applicable to employment tax consents.

IRM 4541.71(1) indicates that an agent should ask the taxpayer to sign an "open-ended" restricted consent on Form 872-A, but if the taxpayer prefers, the Service will accept a restricted Form 872 instead. Under section 6501(c)(4)(B), which was added by the IRS Restructuring and Reform Act of 1998, the Service is required to notify taxpayers of the right to refuse to extend the statute of limitations, or to limit the extension to particular issues or to a particular period of time. This provision applies only to requests to extend made after December 31, 1999. However, as noted above, the taxpayer has stated that it will only execute a restricted consent.

The District Director is authorized to execute restricted consents in limited circumstances, including the need to establish an interpretive position through court decision, regulation, ruling or other National Office action, or where other equally meritorious circumstances exist. Rev. Proc. 68-31, 1968-2 C.B. 917, modified by Rev. Proc. 77-6, 1977-1 C.B. 539. Restricted consents are appropriate for cases placed in suspense, cases held in abeyance awaiting completion of Examination or Appeals action in a related case or in another tax year of the same taxpayer; and other cases where delay in concluding audit action is attributable to the Service, or is attributable to other factors beyond the taxpayer's control.

As a general rule, a restricted consent should not be used if more than two issues must be held open. Difficulties in clearly and accurately describing the scope of the consent should be taken into account in determining whether a restricted consent should be used. IRM 4541.71(2). There is only one issue in this case.

The Internal Revenue Manual contains guidance on the wording of restricted consents. All restrictive consents must contain the following basic restrictive language: "The amount of any adjustment to (description of the area(s) of consideration) including any consequential changes to other items based on such adjustment." IRM 4541.72(1). The description should describe the area of consideration, i.e., the transaction or item, rather than the proposed tax treatment. The description should not be so precise that it forecloses the use of alternative rationales, and should not include Internal Revenue Code sections. IRM 4541.72.

Where the resolution of the unresolved issue will have an automatic effect on other items, the following phrase may be added to the restrictive statement to cover automatic adjustments: "and includes any amount resulting from statutory computation or recomputations based on such adjustment." IRM 8233(12)(3).

To ensure that a consent is restricted for both deficiency and refund purposes, the following statement should be inserted after the restrictive statement: "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement." IRM 8233(12)(4).

The authority to execute restricted consents on behalf of the Service has been delegated to District Directors, and redelegated to their subordinates of Grade GS-11 and higher, including Reviewers GS-11, Group Managers; Case Managers; and Returns Programs Managers. Delegation Order No. 42 (Rev. 13), 1980-1 C.B. 571; Bridges v. Commissioner, T.C. Memo. 1983-763.

We recommend that you use the following language:

"(1) The amount of taxes due from the taxpayer under:

(b) The Federal Insurance Contribution Act, for tax periods from [REDACTED] through [REDACTED] plus any applicable additions to the tax, may be assessed at

any time before [REDACTED].

- (2) The collection provisions and limitations now in effect will also apply to any tax assessed within the extended period.
- (3) The amount of any assessment of tax under the Federal Insurance Contribution Act is to be limited to that resulting from any adjustment to the amount of wages paid by the taxpayer because of disqualifying dispositions of stock acquired pursuant to the taxpayer's Employee Stock Purchase Plan including any consequential changes to other items based on such adjustments. The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement."

If you have any questions with respect to this matter, do not hesitate to contact the undersigned at (617) 565-7903.

MAUREEN T. O'BRIEN
Assistant District Counsel

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By: _____
HUGH P. BONNER
Attorney